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No. 272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF ALCOHOL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT.

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Statement.

On December 22, 1932, and December 30, 1932, respectively, a libel (R. 2-4) and an amendment thereto (R. 12) were filed (the latter not having been allowed) (R. 12) in the United States District Court for the District of New Jersey against the vessel's cargo of alcohol.

The libel and the amendment thereto prayed for a forfeiture of the alcohol on the following grounds:

1. That it was not included or described in the vessel's manifest, and hence was subject to forfeiture in accordance with Section 584 of the Tariff Act of 1930.

2. That it contained more than one-half of one per cent. of alcohol and had been imported into the United States without proper permit, and therefore, was subject to forfeiture under the provisions of Par. 814 of the Tariff Act of 1930.

3. That there was unladen, trans-shipped to, placed in, and received in the said vessel 146,157 gallons of alcohol

of the value of $781,939.95, in violation of the provisions of Sec. 584 of Par. 814 of the Tariff Act of 1930, and that therefore, the Master of said vessel became liable to the penalty equal to twice the value of the said merchandise, to wit: $1,563,879.90, and the said merchandise became subject to forfeiture in accordance with Section 594 of the Tariff Act of 1930.

4. That the vessel was employed in a trade other than what for which she was licensed, to wit: The trade of transporting intoxicating liquor, which was an "illicit trade," and hence the cargo was subject to forfeiture under R. S. Sec. 4377.

To this libel the claimant filed an answer (R. 6, R. 11) putting in issue all of the material allegations of the libellant's causes, and among others, the specific issue referred to by the petitioner, to wit: Whether the alcohol was imported illegally.

The District Court declared the alcohol forfeit on the fourth cause set out in the libel; that is, because the cargo was carried on a vessel employed in a trade other than that for which she was licensed (R. S. Sec. 4377) (R. 29-30).

On October 2, 1934, the Circuit Court of Appeals for the Third Circuit reversed the decree of forfeiture (R. 289-290) and the final decree was entered the same day (R. 290-291).

The United States filed a petition for rehearing, which was denied December 5, 1934 (R. 301).

On November 22, 1934, the Circuit Court of Appeals ordered the alcohol sold, and further ordered that the proceeds of sale should be deposited in the Registry of that Court, and "be substituted in the place and stead of the said 146,157 gallons of alcohol, and that all further

proceedings *herein* shall be against said proceeds of sale" (R. 297-299).

(Note: In the statement contained in the petitioner's brief at Page 4, the word *"herein"* does not appear in the quoted portion of the Circuit Court's order. The reason we point this out is that the word *"herein"* is vital in that it limits the libellant to the causes specified in its libel.)

On September 13, 1934 (R. 287) there was an answer filed to the petition of Frank Rizzo, in which the United States alleged in Paragraph 5 thereof (R. 289):

> "It is further alleged that the said alcohol was properly condemned as forfeited for violation of the provisions of R. S., sec. 4377 (title 46, sec. 325, U. S. C.), because the said vessel was being used in a trade in fraud of the revenue of the United States, and that an allegation in the libel to the effect that said vessel was transporting alcohol in violation of the National Prohibition Act was in legal effect an allegation that the said alcohol was being carried without payment of tax due the United States of America, and that said alcohol was properly the subject of forfeiture."

On December 4, 1934, an order was made fixing the terms of sale of the cargo of alcohol, "as representing the terms of sale agreed upon" (R. 300). It was agreed by and between the parties that the said alcohol should be sold "free and clear of all claims of any kind or character" (R. 299-301).

On December 8, 1934, the United States Marshal for the District of New Jersey offered the said alcohol at public auction, and the highest bid therefor was $1.85 per wine gallon (R. 301-302).

On December 11, 1934, the lower Court confirmed the sale and ordered that the alcohol be delivered to the purchaser "free and clear of any and all claims of any kind or character; free of all government taxes or tax liens

of any kind or character; free of all custom duties; and that the said alcohol or spirits intended for beverage purposes shall be treated by the United States Government and any of its departments as tax paid, * * *" (R. 302-304).

An exception was taken only to the jurisdiction of the Circuit Court of Appeals to make the order (R. 304).

A petition for a writ of certiorari, questioning the authority of the United States Circuit Court of Appeals to include these provisions as to taxes in its order of confirmation, was denied by this Court on January 21, 1935. (U. S. *v.* Frank Rizzo, claimant of 146,157 gallons of alcohol, October Term 1934, No. 621, 294 U. S. 709.)

On January 24, 1935, there was filed in the office of the Clerk of the Circuit Court of Appeals for the Third Circuit assignments of approximately $221,000 of said proceeds by the claimant Rizzo (R. 304-306).

On February 2, 1935, the United States filed in the Circuit Court of Appeals a petition asking that the Court direct that the proceeds of the sale be paid over to the Treasurer of the United States in satisfaction of an alleged lien for alleged taxes due on said alcohol (R. 307-311).

The Collector of Internal Revenue, one Charles V. Duffy, averred that he had not issued stamps for the said drums of alcohol, nor had he received the money for the stamps nor had any part of the tax due on the said alcohol been paid in his district (R. 310-311).

On April 22, 1935, a notice of levy for the alleged tax was addressed to and filed with the Clerk of the said Circuit Court of Appeals by the Collector of Internal Revenue for the First Collection District of New Jersey, together with warrant for distraint, two copies of tax liens under

Internal Revenue laws, and a copy of notice of demand for tax (R. 312-320).

On the same date similar notices and demands were addressed to and filed with said Clerk by the Collector of Internal Revenue for the First Collection District of Pennsylvania (R. 320-324).

On June 4, 1935, the Court below entered the order complained of, directing "that said fund be paid over by the Clerk of this Court to the Claimant, Rizzo, or his assigns, in accordance with the decree heretofore entered on October 2, 1934" (R. 325-326).

This Court granted the government's petition for a writ of certiorari on October 14, 1935 (R. 330).

POINT I.

The libellant consented to the sale of the alcohol free and clear of any taxes.

The order of June 4, 1935, was a purely administrative order, concerning as it did merely the carrying out of the order of October 2, 1934, according to its true intent and purpose (*Wynkoop, Hallenback, Crawford Co.* v. *Thomas J. Gaines, Jr.*, 227 U. S. 4, 57 L. Ed. 391).

The Court below did not err in holding, as contended by the petitioner, in effect, by its order of June 4, 1935, that the United States had waived its right to assert a claim for taxes on the alcohol. (See Government's brief, p. 8 under "Specification of Errors to be Urged," subdiv. 1.)

The fact is that full opportunity had been given to the libellant to do so. It never offered any evidence of the failure to pay any tax, import duty or otherwise. That it never was the intention to assert such claim, after the cause had terminated, appears specifically by the quoted

portion of the claim made by the attorney for the libellant in the answer to the claim, wherein it is alleged by the United States Attorney, under paragraph 5 (R. 289) that the alcohol was properly subject to forfeiture because the vessel was "being used in a trade in fraud of the revenue of the United States" and that "the said alcohol was being carried without payment of tax due the United States of America."

Furthermore, the United States specifically consented to the sale of the alcohol free and clear of any taxes at a time when there was doubt, as to whether in fact a tax was assessable on alcohol during the efficacy of the Eighteenth Amendment.

POINT II.

There is no proof that the alcohol was manufactured in the United States and that a lien accrued thereon.

The government's position in this writ is based on an assumed condition, which is unsupported by the record and which infects each of the errors urged by the government (Government's brief, p. 8) with a vice that cannot be erased, to wit: The assumption, wholly unsupported by the record, that the alcohol in suit was of domestic manufacture, so that a lien could attach, if at all. (See R. S., Sec. 3251.) In any event, any alleged lien was lost, if one existed, and could not be transferred, as such, against the proceeds of sale, because it would in effect be inequitable in the face of the deprival to the claimant of his entire interest in the subject matter. (*Cf. Beal* v. *White,* 74 U. S. 382; *United States* v. *Turner,* Fed. Cas. 16584; *Alkan* v. *Bean,* Fed. Cas. 202.). (Government's brief, p. 35; R. S. 3186; R. 315.)

The libellant alleged, as appears in the second cause of forfeiture, that the alcohol had been imported into the United States without proper permit for same having

been issued, relying on Par. 814 of the Tariff Act of 1930, and the libellant also relied on Sec. 594 of the Tariff Act of 1930, as well as Sec. 584 of the Tariff Act (R. 2-3).

Issue was taken with respect to all the material allegations of the libel (R. 11), the claimant putting in issue the claim of an illegal importation by denying that the alcohol was imported into the United States.

No evidence whatsoever appears in the record with respect to the place of manufacture of the said alcohol, and the specious reasoning of the government in its brief in an effort to create an alleged lien falls short of any reference to the record which, in any way, indicates the place of manufacture of the alcohol. On the contrary, the government's pleading alleges that the alcohol was imported.

The syllogistic reasoning contained in the footnote on page 12 of the Government's brief is based on this fallacious premise.

Without proof that the alcohol was manufactured in the United States no lien can attach, and hence, on the record in this cause, the judgment should be affirmed.

There is no dispute concerning the nature of the tax necessary for the government to succeed in this cause, the government assuming the burden throughout its brief of establishing the fact of domestic production in order to create a lien.

On the other hand there is no evidence whatsoever, either conclusive or even presumptive, of domestic manufacture. The government took the position and libeled the alcohol in question under the definite contention and allegation that the same "had been imported into the United States without proper permit" (R. 3, allegation 9 of the libel under the second cause of forfeiture).

POINT III.

The final decree entered October 2, 1934 was admittedly correct and adjudicated all of the rights of the parties in the within cause.

The order of June 4, 1935 was properly made and entered inasmuch as the final decree of October 2, 1934, adjudicated all of the rights which the respective parties to this proceeding had in the *res*, and no appeal from that decree had been taken, it having been conceded to be a correct determination of the cause. (See Government's brief, p. 7, in No. 621, October Term, 1934.)

In seeking title to the *res* by the claim of forfeiture, each and every right is deemed to have been adjudicated by the final decree. (*Tait* v. *Western Maryland R. Co.*, 289 U. S. 620; *Southern Pacific R. Co.* v. *U. S.*, 168 U. S. 1, 49; *U. S.* v. *Moser*, 266 U. S. 236.)

Res adjudicata is applicable in tax litigations.

(*New Orleans* v. *Citizens Bank of Louisville*, 167 U. S. 371.)

The language in *Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316, 321, accurately describes the present situation:

> "*A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show.* The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of

facts alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true,* they conclusively evince.'" "Chobanian *v.* Washburn Wire Co., 33 R. I. 289, 302, 80 Atl. 394, Ann. Cas. 1913D, 730." (Italics ours.)

United States v. *Moser, supra,* p. 242, states:

"But a *fact, question,* or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." (Italics ours.)

American Express Co. v. *Mullins,* 212 U. S. 311;

Reed v. *Allen,* 286 U. S. 191;

Vinson v. *Graham,* 44 F. (2) 772.

This Court in *Various Items* v. *United States,* 282 U. S. 577, at page 579 stated:

"Included in the $6.40 is the basic tax of $2.20, which is not a penalty but a true tax. Only the remaining part of the $6.40 may be regarded as a penalty, but whether the exaction be a tax or a penalty, or partly one and partly the other, there is no constitutional objection to enforcing it by forfeiture of the offending property. See United States *v.* One Ford Coupe, 272 U. S. 321, 328-329."

In *Gelston* vs. *Hoyt,* 3 Wheat. 246, 320, we have a clear statement of the doctrine which excludes the possibility of litigating the point of the tax now urged by the government in its brief. The Court states:

"Upon principle, therefore, we are of opinion that the sentence of acquittal in this case, with a denial of a certificate of a reasonable cause of seizure, was conclusive evidence that no forfeiture was incurred, and that the seizure was tortious; and that these questions cannot again be litigated in any other forum. And if the point had never been decided, we should, from its reasonableness and known analogy to other proceedings, have had entire confidence in the correctness of the doctrine. But there are authorities directly in point which have never been overruled, nor, as far as we know,

> ever been brought judicially into doubt. Above a century ago it was decided by Mr. Baron Price (12 Vin. Abrid. A. B. 22, p. 95) that an acquittal in the exchequer was conclusive evidence of the illegality of the seizure, and he refused in that case (which was trover for the goods seized) to let the parties in to contest the fact over again. . . . If to these decisions we add the pointed language of Lord Chief Justice DeGrey, in the Dutchess of Kingston's Case, 11 State, Trials, 218, etc., 'That the rule of evidence must be, as it is often declared to be, reciprocal,' etc."

So, too, all claims of any interested party in the *res* should have been asserted in the cause after the monition issued and the world was put upon notice that the court held custody of the alcohol, subject to any claim of any interested party therein.

In *Rounds* v. *Cloverport Foundry and Machine Co.*, 237 U. S. 303, 306, Chief Justice Hughes, speaking for this Court, said:

> "The proceeding in rem which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.' By virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it the property passes, and not merely the title or interest of a personal defendant."

POINT IV.

It was stipulated, and an order entered on the said stipulation, that the fund realized on the sale of the alcohol was to answer only the causes of forfeiture alleged and set forth in the libel.

As heretofore pointed out, it was expressly stipulated (R. 300), and the order so declared, that the fund realized upon the sale of the alcohol was to answer the purposes of the suit under the causes enumerated in the libel as it then stood, for by the Court's order of November 22, 1934, it was adjudged and decreed that the proceeds of sale "be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings *herein* shall be against said proceeds of sale." The word "herein" has the significance of referring to the causes pending in the libel under which the seizure was sought to be justified and under issues which had already been drawn by the pleadings.

The stipulation is binding on the government and it cannot now complain. (*Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281.

The statement appearing in the government's brief at page 23 (reading as follows) is unsupported by the record:

> "Having read the court's order of November 22, 1934, as preserving all liens against the proceeds, the United States Attorney felt that he was on safe ground so far as taxes were concerned. With this justifiable optimism, he reached the crucial agreement as to the 'terms of sale.' This is the agreement which is recited in the order of December 4, 1934, and the only evidence upon which the respondent bases his contention that the Government has waived all its rights to taxes."

Numerous reasons suggest themselves as to why this statement lacks conviction.

It has already been shown that prior to the reversal of the decree of the District Court forfeiting the alcohol, the United States Attorney attempted to justify the forfeiture under the libel because "the said alcohol was being carried without payment of tax due the United States of America" (R. 289). And, too, the failure of the government to object to the order of confirmation, on the ground that the amount realized would be insufficient to pay the full claim of their tax is another indication that the government had waived its claim for tax lien, else it should have seen fit and should have been vigilant to object to the amount realized upon the sale, because of the deprivation to the government of its complete share in the tax, even if the whole fund were turned over to it.

POINT V.

The claim in the within cause is for a penalty and, as such, fell with the repeal of the Eighteenth Amendment.

The alleged tax sought to be recovered in this action is, in truth, a penalty imposed by Congress for violation of the National Prohibition Act. It was sought to forfeit the property by reason of the violation of the National Prohibition Act, and it was by virtue of the repeal of that Act that the decree of the District Court was reversed.

As stated in *United States* v. *Glidden Co.*, 78 F. (2d) 639:

> "We start with the general principle announced in Lipke *v.* Lederer, 259 U. S. 557, 42 S. Ct. 549, 551, 66 L. Ed. 1061: 'The mere use of the word "tax" * * * is not enough to show that within the true intendment of the term a tax was laid,' for 'when by its very nature the imposition is a penalty, it must be so regarded'; or with the definition of a tax in United States *v.* LaFranca, 282 U. S. 568, 51 S. Ct. 278, 280, 75 L. Ed. 551, 'A "tax" is an en-

> forced contribution to provide for the support of government; a "penalty," as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.' The basic tax laid by section 900 of the 1926 Revenue Law was imposed upon all distilled spirits produced or imported into the United States, to be paid by the distiller or importer when withdrawn. Subdivision 4 of that section imposed an additional exaction on such distilled spirits as are 'diverted to beverage purposes' to be paid, not by the distiller or importer, but by 'the person responsible for such diversion,' with a credit for the basic tax if previously paid. *Since the defendants were neither distillers nor importers, and have paid no basic tax, the exaction here sought to be recovered is either wholly a penalty or wholly a tax, and is not partly penalty and partly tax.*" (Italics ours.)

The repeal of the Eighteenth Amendment to the Constitution by the ratification of the Twenty-First Amendment thereof, deprived the Court of jurisdiction to entertain any proceedings in this action with respect to the enforcement of the alleged tax, which was commenced after the date of such repeal.

The ratification of the Twenty-First Amendment of the Constitution, which repealed the Eighteenth Amendment was consummated on December 5, 1933.

United States v. *Chambers & Gibson,* 291 U. S. 217.

It has been held by the United States Supreme Court in *United States* v. *Chambers & Gibson, supra,* that the Federal courts since the repeal of the Eighteenth Amendment are deprived of jurisdiction to entertain proceedings under indictments in criminal action charging violation of such parts of the National Prohibition Act as

rests upon the grant of authority to the Congress by the Eighteenth Amendment and that this consequence is not altered by the fact that the crimes sought to be punished were committed while the National Prohibition Act was in effect.

To the same effect see:

Smallwood v. *United States* (C. C. A. 5), 68 Fed. (2d), 244;

Green v. *United States* (C. C. A. 9), 67 Fed (2d) 846;

United States v. *Oliver,* 5 Fed. Supp. 500;

United States v. *Matoil Service & Transport Co.,* 72 F. (2d) 772.

The ruling in the *Chambers* case applies as well to actions to recover penalties like the present case.

The *Chambers* case cites with approval *Yeaton* v. *The General Pinkney,* 5 Cranch. 281, where the statute under which a ship had been condemned in admiralty had expired while the case was pending on appeal. This Court held that the cause was to be considered as if no sentence had been pronounced. Chief Justice Marshall said in that case:

> 'It has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

The Supreme Court in the *Chambers* case also relied upon *Maryland* v. *Baltimore & Ohio R. R. Co.,* 3 How. 534, where Chief Justice Taney said at page 552:

> "The repeal of the law imposing the penalty, is of itself a remission."

This Court, in *Gulf, Colorado & Sante Fe Railway Co.* v. *Dennis,* 224 U. S. 503 (cited by this Court in the *Chambers* case) reversed a judgment of the lower Court granting to the plaintiff a certain sum as an attorney's fee, in view of the fact that the statute under which the attorney's fee was awarded had been held unconstitutional by this Court since the judgment of the lower Court had been rendered. This Court stated at page 506:

> "These questions may not be directly answered by the prior decisions of this Court, but their right solution is more than suggested by the well-recognized rule of decision, that when, during the pendency in an appellate court of an action for a penalty, civil or criminal, the statute prescribing the penalty is repealed, without any saving clause, the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered."

The doctrine of the *Chambers* case, therefore, clearly applies to civil actions to recover penalties.

United States v. *Matoil Service & Transport Co., supra.*

The facts in this case, together with the position taken by the government, indicate that the claim is made for a penalty rather than a tax.

It was urged by the proctor for the libellant that the reason for his failure to assert any claim for taxes as against Rizzo was that he had not shown that he had a proper standing or status in the libel suit, and until such time as such status was established by Rizzo he would not make any claim for taxes against him.

The personal responsibility which attached to Rizzo and the claim as against him, of course, can only be re-

garded as a claim for a penalty against the diverter of the alcohol. This, to quote from the case of *United States* v. *Constantin*, No. 40, October Term 1935, decided December 9, 1935, is "significant of penal and prohibitory intent rather than the gathering of revenue." It was the conduct of the taxpayer, violative of the law, which was to determine whether to proceed against him or not.

Forfeiture was sought in the case at bar without success.

The final decree was not appealed from by the libellant. As heretofore pointed out, that judgment stands as *res adjudicata* with respect to all of the matters which might have been litigated concerning the subject matter herein.

POINT VI.

Collection of the tax must be effected in accordance with the statutes governing the same and the procedure attempted in the within cause is wholly alien to the said statutory requirements.

In the Revised Statutes there is specific provision made charging the Commissioner or Collector of Internal Revenue with the onus of collecting the tax, and the method and manner of collection and accounting is completely provided for by the Congress in the Statutes which constitute the machinery for the enforcement of the Internal Revenue Laws (Revenue Act of February 26, 1926).

Subdivision (a) of Sec. 600 of the Revenue Act of 1918, as amended, is amended to read as follows:

> "Sec. 600 (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn

and collected under the provisions of existing law:" (Italics ours).

Congress has also made it the duty of the Collector of Internal Revenue "having knowledge of any wilful violation of any law of the United States relating to the revenue, within thirty days after coming into possession of such knowledge, to file with the District Attorney of the District in which any fine, penalty or forfeiture may be incurred, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, setting forth the provisions of the law believed to be so violated on which reliance may be had for condemnation or conviction" (Sec. 26, Title 26 U. S. C. A.).

And under Sec. 486 of Title 28, U. S. C. A. it is the duty of the United States Attorney for the District in which a claim is made by the Collector of Internal Revenue "to cause the proper proceedings to be commenced and prosecuted without delay, for fines, penalties and forfeitures in such case provided."

From the foregoing it clearly appears that the entire machinery for the institution of actions for the collection and enforcement and payment of revenue must be utilized by the Commissioner or Collector of Internal Revenue, the statutory designee, and the United States Attorney must institute such proceedings when called upon to do so on behalf of the Commissioner or Collector of Internal Revenue.

The machinery provided for by the Congress for the enforcement and the collection of taxes was entirely ignored in the case at bar. The statute requires the collection to be effected by the Commissioner or Collector of Internal Revenue.

The failure to comply with the statutory requirements is fatal, as the mode of enforcing the right to collect the

tax is specifically prescribed by statute and is the only method of enforcement.

Furthermore, in the case at bar there was no executive seizure by the Collector of Internal Revenue, but there was a seizure by the Collector of Customs (R. 2).

The libel proceedings through the monition gave notice to the entire world to appear therein and after the adjudication in the case at bar, it was too late for any party claiming an interest in the *res* to appear, intervene or make claim.

Rounds vs. *Cloverport Foundry and Machine Co.*, *supra.*

Finally, if the claim could not be made, as petitioner urges in this cause, since it was on the admiralty side, then the entry of the order of June 4, 1935 denying the libellant's attempted intervention is without error, and the libellant cannot complain by reason of the entry of the said order.

(*"The Lottawanna,"* 20 Wall. 201, 221.)

Wherefore, it is respectfully submitted that the order of the court below be affirmed.

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